

## I. INTRODUCTION AND PROCEDURAL HISTORY

On September 16, 1998, AT&T Communications of New England, Inc. ("AT&T") filed with the Department of Telecommunications and Energy ("Department") a petition for a waiver of the requirement contained in G.L. c. 93, § 109 that the change of a primary telecommunications provider be confirmed by a tape recording made by a third party verification company. Section 109 was part of a new Massachusetts law ("Slamming Law") designed to protect consumers from the unauthorized switching of their local or long distance telecommunications carrier, also known as "slamming." This law was enacted on September 11, 1998 and will go into effect on December 10, 1998. The Department docketed AT&T's petition as D.T.E. 98-94.

Massachusetts' Slamming Law requires a telecommunications carrier to obtain either a letter of agency from the customer or a tape recording of a third party verification ("TPV") call made to the customer, in order for that change in carrier to be considered properly authorized. G.L. c. 93, § 109(a). The Department is given the discretion to waive the tape recording requirement if the carrier can demonstrate that its proposed verification system provides a level of protection for consumers equivalent to that of a tape recording. G.L. c. 93, § 109(c)(5).

Pursuant to notice duly issued, a public hearing on AT&T's petition was held at the Department's offices on November 9, 1998, at which time the Department granted the petitions to intervene of Sprint Communications Company L.P. ("Sprint"), New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic"), and MediaOne Telecommunications of Massachusetts, Inc. The Attorney General of the Commonwealth ("Attorney General") intervened as of right pursuant to G.L. c. 12, § 11E. The Department conducted an evidentiary hearing on November 23, 1998. AT&T sponsored the testimony of two witnesses: Dawn M. Russell, an AT&T marketing manager for the metro market small business organization; and Candace Ryan, an AT&T staff manager.

Initial briefs were filed by AT&T on November 30, 1998 and by the Attorney General on December 1, 1998, one day after the deadline. Reply briefs were filed by both parties on December 3, 1998.

On November 19, 1998, the Department received a petition from Sprint requesting that it be granted a similar waiver of the tape recording requirement in this proceeding. Rather than consider Sprint's petition simultaneously with AT&T's earlier-filed petition and because consideration of Sprint's petition in D.T.E. 98-94 raised concerns of inadequate public notice, the Department docketed Sprint's petition as D.T.E. 98-115 and is investigating it separately.

## II. POSITION OF THE PARTIES

### A. AT&T<sup>(1)</sup>

AT&T states that it has demonstrated, through evidence of the TPV procedures that it follows as well as through evidence of the small number of customer complaints regarding primary interexchange carrier ("PIC") or primary local exchange carrier ("PLEC") changes initiated by AT&T in Massachusetts, that independent TPV providers used by AT&T operate verification systems that ensure a level of protection for consumers at least equivalent to that of tape recording (AT&T Initial Brief at 1). The independent TPV representatives used by AT&T follow mandatory scripts to verify customer requests to be switched to AT&T (id. at 2). These scripts solicit from the customer all of the information specified in G.L. c. 93, § 109(c), and obtain from the customer a unique and verifiable code, and that information is recorded and saved electronically (id. at 2-3). If the customer is unwilling to provide a unique security code to confirm his or her responses and choice, the verification is unsuccessful and no PIC change is processed (AT&T Reply Brief at 2). TPV employees are monitored to ensure that they follow these scripts, and all specified procedures (AT&T Initial Brief at 3). The TPV providers used by AT&T comply with the requirements of G.L. c. 159, § 12E(2) (id. at 4-5). AT&T states that its verification systems have operated successfully, pointing to the fact that in both 1997 and 1998 it has received only two slamming complaints each year in Massachusetts related to PIC changes involving TPV, and that this small number of complaints represents a negligible percentage of AT&T's total PIC changes in Massachusetts (id. at 5). AT&T takes the position that it has demonstrated that its TPV systems and procedures provide consumers with protection against slamming that is equivalent if not superior to that afforded by tape recording of TPV requests, and that it should therefore be granted a waiver from the tape recording requirement as provided in G.L. c. 93, § 109(c)(5) (id. at 6).

#### B. ATTORNEY GENERAL

The Attorney General argues that AT&T's system provides no means of verifying a customer's assent to a carrier change; rather, it memorializes only a verifier's data entries (Attorney General Initial Brief at 5). AT&T's system, according to the Attorney General, does not provide consumers with reliable, objective evidence to prove or disprove that a third party verifier inaccurately verified a consumer's PIC change request. Instead, it provides only an electronic record which can produce a printout listing the consumer's telephone number, transaction code of the sales office and agent that took the call, the transaction date, and the disposition of the PIC change request (id. at 5-6).

The Attorney General argues that the critical answer to the question of whether the consumer authorized AT&T to switch the consumer's carrier to AT&T is manually entered into the record by the TPV agent. Therefore, the electronic record and printout are no more reliable than the individual inputting the data into the record (id. at 6).

Without a tape recording, or an equivalent alternative, the Attorney General argues that there will be no objective evidence upon which the Department may rely in disputed cases. The Department will instead have to guess which party is telling the truth or which party made a mistake (id.). The Attorney General argues that equivalent protection is

"objectively verifiable evidence of consent beyond the mere say so of some third party verifier" (Attorney General Reply Brief at 1).

### III. ANALYSIS AND FINDINGS

Under the recently enacted anti-slamming law, the Department may waive the above-mentioned tape recording requirement if the requesting entity demonstrates to the satisfaction of the Department that it has "an adequate [third party] verification system according to standards that ensure a level of protection for consumers equivalent to that of recording." See G.L. c. 93, § 109(c)(5). While it is clear from the statute that the petitioning entity, in this case AT&T, has the burden of proof with regard to demonstrating the adequacy of its verification system, the statute is silent about what "standards" the Department must apply to determine equivalency with tape recording.<sup>(2)</sup> Therefore, the Department must determine such standards in this order.

To receive a waiver of the tape recording requirement, the Department finds that the petitioner's system must capture in written or electronic form the information required to be tape recorded under § 109(c)(2).<sup>(3)</sup> This written or electronic record must be maintained by the petitioning entity or the TPV company for at least one year and be available, at no charge and upon request, to the Department, the Attorney General, or the customer. The information gathered from the TPV call shall not be used for any marketing purpose by the TPV company. To ensure consistency, the employee of the TPV company shall read from a script that elicits the information required in § 109(c)(2), and shall be prohibited from deviating from the script. Moreover, the TPV employee shall be prohibited from modifying, or otherwise altering, the billing telephone number ("BTN") and information regarding the service to be changed. Should a discrepancy arise between the BTN or service information provided to the TPV employee by the carrier's agent or employee and that information given by the customer, no verification may occur. Lastly, monitoring of the TPV employees for quality assurance must be performed by both the petitioning carrier and the TPV company. The Department finds that, at a minimum, these factors must be present in a petitioner's TPV system in order to obtain a waiver.

The Department also may look to the carrier's slamming history in the Commonwealth, and whether the carrier's agreement with the TPV company requires anti-slamming training for the TPV employees as evidence that the carrier's system provides a level of protection for consumers equivalent to recording. Consideration of a carrier's slamming history may indicate how that carrier's TPV system, as represented to the Department on paper, works in practice. The Department recognizes that mandatory anti-slamming training of TPV employees would make these employees aware of the legal significance to the carrier for unauthorized service changes.

In applying these standards to AT&T's petition, we find that AT&T's TPV system meets our test. The Department finds that the scripts used by the employees of AT&T's TPV vendors elicit the information required by § 109(c)(2) (Exhs. AG-11, DTE-19). The electronic copies of the TPV calls with residential customers are maintained by AT&T

for at least one year (Exh. DTE-7). For business customers, AT&T maintains an electronic copy of the verification for four years (Exh. DTE-19, at 2). The information collected during the TPV call is proprietary to AT&T and AT&T does not sell this information to third parties (Exh. DTE-6).<sup>(4)</sup>

Employees of AT&T's TPV vendors are required to read verbatim from AT&T-provided scripts, which contain the information described above, when verifying customer requests to be switched to AT&T (Exhs. AG-3, AG-11, AG-26, AG-29, DTE-19). This requirement is made explicit in AT&T's contracts with TPV companies (Exh. DTE-18, exh. B at 4), and TPV employees cannot change the BTN or services to be verified (Exhs. AG-3, AG-7).

Under AT&T's TPV system, no verification occurs if there is a discrepancy in the information provided to the TPV company by the AT&T telemarketing agent concerning the phone number or requested service to be changed and the information the consumer provides (Exhs. AG-3, AG-7). Should such a discrepancy arise, the order is withheld from the provisioning process (Exh. AG-7), and, thus, the change is not forwarded to the local exchange service provider. Finally, both AT&T and the TPV companies monitor TPV employees to ensure that they adhere to the scripts (Exhs. AG-3, AG-13, AG-29).

In addition, slamming complaints involving AT&T's TPV system in 1997 comprise a minuscule or de minimis percentage of AT&T's PIC changes in the Commonwealth (Exhs. AG-1, AG-23, RR-DTE-2), which suggests that AT&T's TPV system is effective at protecting Massachusetts consumers from being slammed.

We note that while the Attorney General urges the Department to require "objectively verifiable evidence" as a substitute to tape recording, he fails to indicate what form such evidence should take (see Attorney General Reply Brief at 1). The Attorney General's unwillingness or inability to suggest any means by which a carrier could provide "objectively verifiable evidence," leads the Department to conclude that for the Attorney General, nothing short of tape recording is acceptable. This position cannot find support within the statute because to give effect to the waiver provision contained in § 109(c)(5), the Department must "presume that the Legislature does not intend 'to enact a barren and ineffective provision.'" (see Commonwealth v. Angiulo, 415 Mass. 502, 525 (1993), quoting Insurance Rating Bd. v. Commissioner of Ins., 356 Mass. 184, 189 (1969)).

The Attorney General argues that AT&T's system provides no means of objectively verifying a customer's assent to a carrier change, but rather merely memorializes a verifier's data entries. We disagree. AT&T's TPV system does procure objective evidence from the customer in the form of the unique code that the TPV employee must obtain at the end of the call for the verification process to be complete (Exhs. AG-3, AG-11, DTE-19, Tr. at 20, 26-27, 34-35). This unique code is maintained electronically in the TPV record and, thus, is accessible should a dispute arise (Tr. 26-27).

The standard we have created in this proceeding ensures a level of protection for consumers equivalent to tape recording. In summary, unless and until modified by a

subsequent decision or rulemaking,<sup>(5)</sup> the standard created in this order is as follows: (1) the information required to be recorded under § 109(c)(2) shall (a) be captured in written or electronic form, (b) be maintained by the petitioning entity for at least one year (c) be available at no charge upon request to the Department, the Attorney General, or the customer, and (d) not be used for any marketing purpose by the TPV company; (2) to ensure consistency, the employee of the TPV company shall read from a script that elicits the information required and shall be prohibited from deviating from it; (3) the TPV employee shall be prohibited from altering the BTN and the service to be changed; (4) any discrepancy between the BTN or service information provided to the TPV employee by the carrier's agent and that provided by the customer shall prevent a verification; and (5) the carrier, along with the TPV company, must monitor TPV employees for quality assurance. In addition, the Department may consider the carrier's slamming history in the Commonwealth and review its agreements with TPV companies to determine whether adequate anti-slamming training of TPV employees is provided.

#### V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the petition of AT&T requesting a waiver, under G.L. c. 93, § 109(c)(5), of the requirement that it tape record TPV calls, be and hereby is GRANTED; and it is

FURTHER ORDERED: That AT&T shall be required to make its written or electronic records of TPV calls available to the Department, the Attorney General, or the customer, upon request and at no charge.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. At the Department's request, AT&T provided the Department with the following summary of its position. The Department added the citations and the reference to AT&T's Reply Brief.
2. The Department notes that it requested the parties in this proceeding to address the appropriate standard of review, and what factors the Department should apply under that standard (see Tr. at 81), but the parties declined.
3. Section 109(c)(2) requires that the following information be confirmed by a TPV employee and tape recorded: the identity of the person as well as appropriate verification data; the authority of the person to authorize a change in the primary long distance or local service provider for the identified telephone line(s); and the identity of the carrier that the customer has authorized to be the new primary long distance or local service provider. G.L. c. 93, § 109(c)(2).
4. The record is silent, however, on the issue of the availability of these records at no cost to the Department, the Attorney General, or the customer. To ensure consistency with our standard, we will require AT&T to meet this standard on a going-forward basis.
5. As required by the Slamming Law, the Department must promulgate rules implementing the statute. The Department expects to issue proposed rules shortly.